

1 Q Mr. Kay, did you read this letter?

2 A Yes.

3 Q Did you read this letter shortly after receiving  
4 it?

5 A Yes.

6 Q Okay. And did you understand when you read it  
7 that the FCC was directing you to provide the information  
8 listed in this letter?

9 A Yes.

10 Q Okay.

11 JUDGE CHACHKIN: What exhibit did you say that  
12 was?

13 MR. SCHAUBLE: Exhibit 1, Your Honor.

14 JUDGE CHACHKIN: An exhibit? You gave me the  
15 wrong exhibits. I've got to get your exhibits. I knew  
16 something was wrong here. All right. Go ahead with your  
17 question.

18 MR. SCHAUBLE: Okay.

19 BY MR. SCHAUBLE:

20 Q Mr. Kay, now please turn to the next exhibit,  
21 which is WT Exhibit Number 2. And this is a letter on the  
22 letterhead of Brown & Schwaninger, Lawyers, dated April 7,  
23 1994. This is a three-page letter. Mr. Kay, do you have  
24 the exhibit before you?

25 A Yes.

1           Q     Okay. Now, is it correct that at one time Brown &  
2     Schwaninger represented you before the Federal  
3     Communications Commission? Correct?

4           A     Yes.

5           Q     And approximately during what time period did  
6     Brown & Schwaninger represent you before the FCC?

7           A     I think they started representing me in the  
8     late-eighties. It could have been '88 or '89. I'm not  
9     certain when they began, but it was somewhere in that time  
10    area, and they represented me through approximately  
11    mid-1995.

12          Q     Okay.

13          A     I don't have exact dates or years for you.

14          Q     Okay. Now, is it your understanding that this  
15    letter was actually sent on your behalf to the Federal  
16    Communication Commission?

17          A     Yes.

18          Q     Okay. And have you ever read this letter?

19          A     Yes.

20          Q     Okay. Did you receive this letter on or shortly  
21    after April 7, 1994?

22          A     I believe so.

23          Q     Okay. Did you review either this letter or a  
24    prior version of this letter prior to its being filed with  
25    the Commission on April 7, 1994?

1           A     I don't recall.

2           Q     So it would be correct that Brown & Schwaninger  
3 would have been authorized to file this letter on your  
4 behalf.

5           A     They were my counsel.

6           Q     So it would be correct that they would be  
7 authorized, then. Correct?

8           A     Yes.

9           MR. SCHAUBLE: Okay.

10          JUDGE CHACHKIN: Let's go off the record a moment.  
11 (Discussion off the record at 9:53 a.m.)

12          JUDGE CHACHKIN: Back on the record. Please  
13 continue.

14          MR. SCHAUBLE: Thank you, Your Honor.

15          BY MR. SCHAUBLE:

16          Q     Mr. Kay, please turn to WTB Exhibit Number 3,  
17 which is another letter, dated April 7, 1994. And do you  
18 recognize this as a letter that was filed with the  
19 Commission on your behalf by Brown & Schwaninger?

20          A     Yes.

21          Q     Do you recall seeing a copy of this letter on or  
22 shortly after April 7, 1994?

23          A     That would have been right.

24          Q     Okay. And did you see a copy of this letter or a  
25 prior version of it prior to it being filed with the

1 Commission?

2 A I don't recall.

3 Q Okay. Do you recall discussing the matters  
4 contained herein with Brown & Schwaninger prior to April 7,  
5 1994?

6 A Probably.

7 Q Okay. Do you see on page one there is a paragraph  
8 that start with a number one there, Mr. Kay?

9 A Yes.

10 Q Please take a moment to review that paragraph and  
11 the following paragraph, which goes on to page two.

12 A Yes.

13 Q Now, is that material -- those two paragraphs --  
14 you understood that you were declining to provide the  
15 information the Commission requested in its first request in  
16 Exhibit 1. Correct?

17 MR. SHAINIS: I'm not sure I understand the  
18 question.

19 MR. SCHAUBLE: Okay.

20 JUDGE CHACHKIN: Could you reform it?

21 BY MR. SCHAUBLE:

22 Q Mr. Kay, turn back to WTB Exhibit 1. And do you  
23 see the numbered paragraphs 1 and 2?

24 A Yes.

25 Q And do you see that's a description of certain

1 information the Commission was directing you to provide?

2 A Yes.

3 Q Now, if you turn back to Exhibit 3, do you see  
4 paragraph number 1 and the following paragraph? Do you  
5 understand that in this letter that you, through your  
6 attorneys, were declining to provide that information?

7 MR. SHAINIS: Objection. The letter speaks for  
8 itself, number one. His understanding of the letter is  
9 irrelevant. The letter is here. The letter has been  
10 admitted.

11 MR. SCHAUBLE: Your Honor, I'm asking if the  
12 witness understands a letter that was written on his behalf.  
13 I think the witness's understanding is definitely relevant.

14 JUDGE CHACKIN: The objection is overruled.

15 THE WITNESS: Can you repeat your question,  
16 please?

17 BY MR. SCHAUBLE:

18 Q Certainly. Do you understand that in these two  
19 paragraphs you were declining to provide the information the  
20 Commission was directing you to provide in numbered  
21 paragraphs 1 and 2 of the January 31st letter?

22 A That's what it says here in part.

23 Q Okay. Do you see that these paragraphs also  
24 provide reasons why you're declining to provide the  
25 information?

1           A     That's what the letter says.

2           Q     Okay. Is this letter an accurate list of the  
3 reasons why you declined to provide this information?

4           MR. SHAINIS: Objection. I don't know how this  
5 witness would ever be able to say whether the letter is  
6 accurate or inaccurate. The witness did not write the  
7 letter.

8           MR. SCHAUBLE: It was written on his behalf.

9           JUDGE CHACHKIN: He reviewed it. He can answer  
10 the question.

11          MR. SHAINIS: He did not say that he reviewed the  
12 letter prior to the time it was --

13          JUDGE CHACHKIN: He was furnished a copy of the  
14 letter.

15          MR. SHAINIS: I don't think that was what his  
16 testimony was.

17          JUDGE CHACHKIN: Well, ask him to establish this  
18 witness's knowledge of this letter.

19          MR. SCHAUBLE: Your Honor, the witness testified  
20 that he believes he discussed it, and even if he didn't see  
21 it beforehand, he definitely recalled seeing it on or  
22 shortly after April 7.

23          JUDGE CHACHKIN: All right. Now you want to know  
24 if this is an accurate accounting of the reasons why you  
25 were unwilling to provide this information or if there were

1 other reasons. The objection is overruled.

2 THE WITNESS: These were the reasons my lawyers  
3 put forward. I had to review it carefully, but I do not  
4 believe it is complete, as far as reasons were concerned.

5 BY MR. SCHAUBLE:

6 Q Okay. Can you specifically recall other reasons  
7 why you declined to provide this information? And just so  
8 I'm clear, we are talking, for these purposes, about  
9 paragraphs 1 and 2 of the January 31, 1994 letter.

10 JUDGE CHACHKIN: I think it would be better if you  
11 did each paragraph separately -- the witness has it --  
12 rather than trying to do both paragraphs at the same time.

13 MR. SCHAUBLE: Your Honor, 1 and 2 are pretty  
14 closely-related.

15 MR. KELLER: I think you're confusing him because  
16 you're really referring to 3 and 4, but you're saying 1 and  
17 2. Let's be clear we know which sections of the letter we  
18 are talking about. I believe what you are referring to is  
19 the 1 and 2, not the 2nd and 3rd paragraphs of the letter.  
20 You're talking about Item Number 1, are you not?

21 MR. KNOWLES-KELLETT: I think you misunderstood  
22 Mr. Schauble's reference. He referred to items numbered 1  
23 and 2 in the January 31st letter and paragraphs 2 and 3 --

24 JUDGE CHACHKIN: Well, what I'm saying is I want  
25 him to deal specifically with each item separately and

1 develop with each in them separately -- what information you  
2 want to obtain so there is no confusion in the record.

3 MR. SCHAUBLE: Very well, Your Honor. I'll reform  
4 the question.

5 BY MR. SCHAUBLE:

6 Q Mr. Kay, do you see that the paragraph number 1 on  
7 page one and the following paragraph carrying over on page  
8 two lists reasons why you declined to provide the  
9 information you were directed to provide in paragraph 1 of  
10 the January 31, 1994 letter?

11 JUDGE CHACHKIN: Why don't you ask him the  
12 question, paragraph 1 requested a list of alphabetically the  
13 call signs and license names of all facilities owned or  
14 operated, et cetera, and just ask your question? The next  
15 paragraph deals with facilities located on U.S. foreign  
16 service land.

17 Again ask him why he was unwilling to provide that  
18 information or whatever you want to ask him so we have  
19 something on the record clear as to what you are asking him  
20 about, whether paragraphs 1 and 2, because they do deal with  
21 different subjects. Can you be more specific?

22 MR. SCHAUBLE: Okay. Your Honor, the numbered  
23 paragraph 1 was a January 31, 1994 letter directing Mr. Kay  
24 to list alphabetically the call signs and the licensing  
25 names of all of the facilities owned or operated by you or



1 by any companies under which you do business, and -- those  
2 facilities which are located on U.S. Forest Service land.

3 BY MR. SCHAUBLE:

4 Q Do you have that paragraph in mind, Mr. Kay?

5 JUDGE CHACHKIN: It's on page one, the second  
6 paragraph on page one.

7 THE WITNESS: Of Exhibit 1. Correct?

8 JUDGE CHACHKIN: No, no. Exhibit 3.

9 THE WITNESS: Okay. I have it here.

10 JUDGE CHACHKIN: Now what do you want to know, why  
11 he declined to answer that question or why -- what do you  
12 want to know?

13 MR. SCHAUBLE: The first thing, Your Honor, is  
14 establish that these two paragraphs give a list of reasons  
15 why Mr. Kay declined to --

16 JUDGE CHACHKIN: All right. All right.

17 MR. SCHAUBLE: -- provide that information.

18 JUDGE CHACHKIN: All right. You asked about  
19 paragraph two. Now, what do you want to ask?

20 BY MR. SCHAUBLE:

21 Q My follow-up question is, was this a complete list  
22 of the reasons you declined to provide this information?

23 A I think you're mixing apples and oranges here.  
24 From reading it here -- I just leafed through it -- the  
25 April 7th letter responds to the January 1st FCC letter. I

1 do not believe that while there are numbered paragraphs in  
2 both, I believe that -- I can't mind-read what my attorneys  
3 did back in April of 1994, but it appears to me that the  
4 April 7th letter in its totality, the complete letter  
5 responds to the complete letter of January 31st.

6           You're trying to cut a paragraph out of your  
7 January 31st letter and compare it to a paragraph of the  
8 April 7th letter, and I don't believe that correlation  
9 exists. The reasons for not responding to paragraph one in  
10 the January 31st letter are contained entirely in paragraph  
11 one of the April 7th letter. I believe the entire April 7th  
12 letter responds not only to each individual letter in your  
13 January 31st letter, but to the entire request itself.

14           You just can't compare, like, line for line here  
15 and expect a total answer that way. Just from reading my  
16 attorney's letter, that doesn't make sense.

17           Q     Okay. Let me ask it this way, then, Mr. Kay. Is  
18 WT Exhibit 3, in the time to review the letter, please, an  
19 accurate and complete listing of the reasons why you  
20 declined to provide the information directed in paragraph  
21 one of the January 31st letter?

22           A     I do not know if it contains all the reasons. I  
23 don't remember everything I discussed with my attorneys, and  
24 that would be attorney/client privilege. It's entirely  
25 probable that there are additional reasons that are not

1 contained within my attorney's letter.

2 Q Okay. At this time, do you recall at this time do  
3 you recall any -- reasons?

4 A I'd have to sit here and read this letter and  
5 consider it if I remember them.

6 JUDGE CHACHKIN: Go ahead and read the letter.  
7 We'll go off the record.

8 (Off the record at 10:09 a.m.)

9 MR. SCHAUBLE: What is the relevance if there were  
10 other reasons? This is what he told the Commission. I  
11 assume if you're going to question him, you're going to  
12 question, challenge some of his statements here in this  
13 letter. Why are you asking him if there was anything else  
14 if it wasn't included in what he told the Commission? How  
15 is that relevant?

16 MR. SCHAUBLE: Your Honor, we just want to make  
17 sure that it's a complete record.

18 JUDGE CHACHKIN: Well, the complete record is what  
19 he told the Commission. I mean, if he discussed 16 other  
20 things with his attorney, what does that have to do with  
21 anything? I assume, under the issue, you're going to  
22 challenge what he said in this letter, not what else he  
23 might have had in his mind. This is what he told the  
24 Commission. This is what the Commission relied on. Why are  
25 we going into possible other things he might have discussed?

1     How is that relevant? I mean, don't we have enough in this  
2     letter to ask him questions about?

3             I assume there are some things in this letter  
4     you're challenging, you're claiming that he could have  
5     answered this information, he could have provided this  
6     information, and you're going to challenge his response. Am  
7     I right?

8             MR. SCHAUBLE: Correct, Your Honor.

9             JUDGE CHACHKIN: Well, then, go ahead and  
10    challenge his response; don't ask him if he had other things  
11    in mind that he discussed with the attorney. That's not  
12    relevant. He didn't discuss it with the Commission, so he  
13    can't bring it up now.

14            MR. SCHAUBLE: Okay.

15            JUDGE CHACHKIN: Fine.

16            MR. SHAINIS: So Your Honor's position is it  
17    wasn't brought up to the Commission at this time, it's not  
18    relevant to the issue.

19            JUDGE CHACHKIN: That's right. This is what's  
20    relevant, what he told the Commission, and you want to  
21    challenge those reasons, if you want to challenge them.

22            MR. SHAINIS: Very well, Your Honor. Okay.

23            BY MR. SCHAUBLE:

24            Q     Mr. Kay, turn your direction -- turn your  
25    attention to --

1           A     There was an earlier pending question, wasn't  
2     there?

3                   JUDGE CHACHKIN: Well, he has withdrawn it. I  
4     ruled it's not relevant.

5                   THE WITNESS: Okay.

6                   BY MR. SCHAUBLE:

7           Q     Mr. Kay, turn your attention to the paragraph  
8     numbered one on page one of Exhibit 3.

9           A     Yes.

10          Q     Now isn't it correct that you have argued from  
11     time to time that the Commission's licensing data base or  
12     records are incorrect in some way?

13                  MR. SHAINIS: Objection, Your Honor. I think Mr.  
14     Schauble should be more specific as to when those arguments  
15     were made --

16                  JUDGE CHACHKIN: Sustained.

17                  MR. SCHAUBLE: Your Honor, I think that the  
18     general question is, I don't think the specific instances  
19     are relevant. I think what's relevant here is the general  
20     proposition, or I can just do directly -- I can move  
21     directly to my ultimate question, Your Honor.

22                  MR. SCHAUBLE: What is your ultimate question?

23                  BY MR. SCHAUBLE:

24          Q     Mr. Kay, was it your position that the Commission  
25     had no right to double-check its records and determine

1       whether its records were any different from the records you  
2       might have?

3               THE WITNESS: I'm sorry. Can we begin with that?

4               MR. SCHAUBLE: Certainly.

5               JUDGE CHACHKIN: He is referring to your response  
6       in the last three or four lines of paragraph one. Do you  
7       see that?

8               THE WITNESS: Oh, I think I see.

9               MR. SCHAUBLE: It's helpful if you refer to his  
10      answer, the lines you're talking about. Now go ahead with  
11      your question.

12              BY MR. SCHAUBLE:

13              Q     Okay. Mr. Kay, my question was, was it your  
14      position that the Commission had no right to double-check  
15      its records to determine whether its records were any  
16      different from your records?

17              A     I don't think that's the argument that was made  
18      here.

19              Q     Mr. Kay, was that your position at this time?

20              MR. SHAINIS: The position is what the letter says  
21      it is. I object to the question.

22              JUDGE CHACHKIN: Sustained.

23              BY MR. SCHAUBLE:

24              Q     The fact is, Mr. Kay, when the Commission asked  
25      for this information, you declined to provide it. Correct?

1           A     I believe the letter speaks for itself of all the  
2 reasons, except that there is another letter referenced in  
3 here that I don't have. On page five of this Exhibit 3 in  
4 its letter to Mr. Kay, March 1, there is another letter  
5 that's missing here. There is an earlier letter that's  
6 April 7th. I don't have the exact date, but there is a  
7 reference to a reply. We don't have a complete record here.

8           MR. KELLER: I'm not certain, Your Honor, but I  
9 believe that there is a letter submitted in response to the  
10 January 31st request, the memory serves, February 16th, that  
11 the Bureau for some reason has chosen not to include in its  
12 exhibits, and I presume March 1 -- and Mr. Kay is referring  
13 to his February 16 letter.

14           MR. SCHAUBLE: Your Honor, if Mr. Kay wishes to  
15 enter that letter into evidence, maybe you could -- that  
16 they have the opportunity to do so.

17           JUDGE CHACHKIN: Well, we should have all of the  
18 letters that you are planning -- they didn't provide the  
19 information. Why don't we have all the letters?

20           MR. SHAINIS: I want to remind Mr. Schauble that  
21 Mr. Kay does not have the burden, proceeding of the burden  
22 of proof.

23           JUDGE CHACHKIN: Is there a letter missing here?

24           MR. KELLETT: Inconsequential letters, Your Honor,  
25 have been cut out of the --

1 JUDGE CHACHKIN: Why was it inconsequential?

2 MR. KELLETT: I can't tell you what the February  
3 is 16th is without going back to the office.

4 JUDGE CHACHKIN: Well, why didn't we include all  
5 of the correspondence?

6 MR. KELLETT: Because we tried to cut -- we have  
7 346 exhibits, Your Honor, and if it's something like -- we  
8 would like another two weeks, we might have cut it --

9 JUDGE CHACHKIN: If that's all it said, that's one  
10 thing, but apparently, according to counsel, it contained  
11 more than that.

12 MR. KELLETT: I believe there was, among other  
13 things, a request for confidentiality, and I believe that in  
14 response to it, among other things, the request to 50  
15 copies, it's that series of correspondence that I don't  
16 think is accurately characterized as inconsequential.

17 JUDGE CHACHKIN: Apparently it didn't deal  
18 substantively with the questions asked of Mr. Kay. Did it,  
19 Mr. Keller?

20 MR. KELLER: It dealt with some of the reasons  
21 why, I mean, to the extent that confidentiality was one of  
22 the reasons, it certainly dealt with that.

23 JUDGE CHACHKIN: Well, it should be in the record,  
24 but go ahead. If you felt it's relevant, you can put it in,  
25 Mr. Keller. Go ahead.



1 MR. KELLER: Certainly.

2 JUDGE CHACHKIN: Go ahead, Mr. Schauble.

3 MR. SCHAUBLE: Thank you, Your Honor.

4 BY MR. SCHAUBLE:

5 Q Just to clarify, Mr. Kay, with respect to the  
6 material requested in paragraph one of the January 31, 1994  
7 letter, which was the alphabetical listing of call signs and  
8 licensee names, did you have any confidentiality concerns  
9 concerning that information?

10 A Licenses are all public record. They are  
11 available on line data bases, there is nothing confidential  
12 about licenses themselves, though you don't generally go  
13 making them public to your competitors, if you can avoid it.

14 Q Okay -- answer to your question, Mr. Kay, is did  
15 you have confidentiality concerns about the information  
16 requested -- with respect to the alphabetical list of call  
17 signs and licensee names?

18 A No.

19 Q Okay.

20 Q Now, Mr. Kay, turning to the -- with respect to  
21 the request that you annotate those facilities which are  
22 located on U.S. Forest Service land, and that's the  
23 paragraph that starts on page one going over to page two,  
24 now, it's correct, Mr. Kay, that in this January 31, 1994  
25 letter there is an issue raised as to whether certain

1 facilities licensed to you had, in fact, been constructed.

2 Correct?

3 A It says the Commission received complaints.

4 Q And you also understood at this time that if a  
5 station was on United States Forest Service property, that a  
6 permit from the United States Forest Service was required to  
7 authorize placement of the equipment on Forest Service land?

8 A That's not precisely how the permits worked with  
9 the Forest Service.

10 Q Okay. Would you please provide your understanding  
11 of how the Forest Service permit process works?

12 A The Forest Service did not issue permits for each  
13 transmitter. They issued one initial permit to what they  
14 referred to as a permittee, and that was to use the Forest  
15 Service land. Any additional or further transfers beyond  
16 the first one when you applied for a permit was an  
17 additional modification to the underlying permit. Once you  
18 had a permit, you had a permit, and the subsequent  
19 transmitters were added in different fashions, depending on  
20 how each Forest Service station chose to run its business.

21 Q Is it correct that once you had the permit, if you  
22 wanted to add additional transmitters, you either had to  
23 apply to modify the permit or make a certification to the  
24 Forest Service regarding those additional transmitters?

25 A It varied between the various USFS districts.

1 Each office did things its own way. Often, it was no more  
2 than a notification. The practice in some of these Forest  
3 Service's offices were --

4 Q But it's correct that for each individual  
5 transmitter, at a minimum you had to provide some sort of  
6 notification or informational filing to the U.S. Forest  
7 Service. Correct?

8 A The offices of the Forest Service did not require  
9 it. You have what is in the rule book and what they  
10 actually did, and the way the individual employees at the  
11 Forest Service stations wanted to one their business. We  
12 did what they wanted. They were happy; we were happy. As  
13 long as we had the basic permit, we paid the money, and they  
14 different didn't have problems with any of the permittees,  
15 they were happy; we kept --, Mr. Kay. Was there ever a time  
16 when you placed a transmitter on United States Forest  
17 Service property and did not provide any sort of  
18 notification or filing to the U.S. Forest Service?

19 MR. SHAINIS: Objection as to relevance.

20 JUDGE CHACHKIN: Overruled.

21 THE WITNESS: Once we had the issue permit, we  
22 commonly constructed additional transmitters without saying  
23 anything to the Forest Service.

24 BY MR. SCHAUBLE:

25 Q Let me ask the question this way, Mr. Kay. Did

1     you ever had a transmitter on a new frequency on Forest  
2     Service property without notifying the U.S. Forest Service  
3     in some way?

4           A     Absolutely. All the time, all the time.

5           Q     It was your understanding that you were not  
6     required to notify the U.S. Forest Service that you were  
7     adding a transmitter on a new frequency?

8           MR. SHAINIS: Objection. Relevancy.

9           JUDGE CHACHKIN: Overruled. Go ahead with your  
10    answer.

11          THE WITNESS: Sooner or later we would notify  
12    them. Nowadays we don't notify them at all.

13          BY MR. SCHAUBLE.

14          Q     Okay. Let's talk at the time, 1994, was the time  
15    you responded is it correct that when you added a  
16    transmitter on a new frequency on Forest Service land you  
17    would notify the Forest Service, but it might be or after  
18    the transmitter was actually installed on Forest Service  
19    property?

20          A     Yes.

21          MR. SCHAUBLE: Okay.

22          JUDGE CHACHKIN: When you say you notified them,  
23    in writing or orally or just what?

24          THE WITNESS: The practice varied between the  
25    various Forest Service offices. At some of the transmitters

1     that were -- I don't think they were ever notified on  
2     because they subsequently changed the rules before we ever  
3     notified them so not requiring notification.

4             BY MR. SCHAUBLE:

5             Q     Okay. Do you recall when the rules were  
6     exchanged, Mr. Kay?

7             A     I think it was in '95. I don't know -- the  
8     dockets of the proceedings were out then. I'm not sure of  
9     the effective date.

10            Q     But it would have been after April 7, 1994.  
11     Correct?

12            A     That's when they changed the rules to how they  
13     handled their permits altogether, which also eliminated  
14     notification of frequencies.

15            Q     Okay. Just so the record is clear, that was in  
16     1995. Correct?

17            A     That they eliminated -- they began their process  
18     of eliminating the actual permits and changed their whole  
19     permit scheme, how they did business.

20            Q     Now, isn't it correct that at this time in 1994  
21     that the Forest Service permits would contain at least some  
22     information as to facilities you had constructed on Forest  
23     Service land?

24            A     They would contain some information.

25            Q     Okay. It's correct, true that you declined to

1 provide that information, those permits, to the Commission  
2 -- correct? -- in this April 7, 1994 letter?

3 A I believe that's what the letter from my attorney  
4 says.

5 Q Mr. Kay, directing your attention to the paragraph  
6 number two on page two of WT Exhibit 3, do you have that  
7 before you?

8 A Page two? Okay.

9 Q The paragraph number two. It's the first full  
10 paragraph.

11 A Okay.

12 Q And with respect to the Commission's request that  
13 Mr. Kay supply the original date of grant of the call sign  
14 for each station, do you see that, Mr. Kay?

15 A Yes.

16 Q And do you see, with respect to the Commission's  
17 request that Mr. Kay provide the date and license station  
18 was constructed and placed in operation, "we respectfully  
19 call to the Commission's attention that the Commission's  
20 rules do not require Mr. Kay to keep any record of that  
21 information"? Do you see that?

22 A Yes.

23 Q Now, isn't it true, Mr. Kay, that at this time  
24 that the Commission required you to keep dates and any  
25 pertinent details of any maintenance performed on station

1 equipment?

2 MR. SHAINIS: Objection. What time are you  
3 talking about, Counsel?

4 MR. SCHAUBLE: 1994.

5 JUDGE CHACHKIN: The objection is overruled.

6 THE WITNESS: I'd have to read the rule.

7 MR. SCHAUBLE: Okay. Your Honor, I'd like to  
8 provide to counsel -- this is a printout. I'll also provide  
9 a copy to Your Honor. This is a printout from the 1994 Code  
10 of Federal Regulations, 37 TFR 90.443.

11 JUDGE CHACHKIN: Where would you like him to read  
12 from?

13 MR. SCHAUBLE: Paragraph D, Your Honor.

14 MR. KELLER: Now where in this paragraph is there  
15 any reference to dates of construction and dates of license  
16 granted?

17 BY MR. SCHAUBLE:

18 Q Mr. Kay, do you see that 90.443(b) requires you to  
19 provide, keeping your station records, the dates and  
20 pertinent details of my maintenance performed on station  
21 equipment and the name and address of the service technician  
22 who did the work?

23 A That's what it says.

24 Q Okay. Have you, in fact, ever kept such records?

25 MR. SHAINIS: Objection to relevancy, Your Honor.

1 I mean, we are --

2 JUDGE CHACHKIN: How is it relevant to the letter?

3 MR. SCHAUBLE: Your Honor, he makes the claim here  
4 that he wasn't required to keep information concerning the  
5 date the station was constructed and placed in operation.  
6 The rules in this paragraph requires even broader scope of  
7 information including the date that construction was placed  
8 in operation.

9 MR. KELLER: The rule makes no reference to  
10 construction and operation whatsoever.

11 MR. SCHAUBLE: Any maintenance, records, Your  
12 Honor, would clearly include the date that the transmitter  
13 was originally installed.

14 MR. KELLER: I don't believe that's so clear.

15 MR. SHAINIS: Neither do I, Your Honor.

16 MR. KELLER: There are other sections of the FCC  
17 rules, Your Honor, that when they want the licensee to  
18 either notify the Commission regarding construction dates,  
19 the rules so state that he either has to file a covering  
20 license for some services, file a notification in other  
21 services. Indeed, in this service when the Commission wants  
22 to know the construction date, they write to the licensee  
23 and ask him, but this rule talks about maintenance. It's  
24 clear from subsection (a), too, that they are talking about  
25 maintenance of existing facilities and measurements and



1     these sorts of things.

2                 MR. SCHAUBLE: Your Honor, this is a matter of  
3     what's required to be kept. What Mr. Kay is required to  
4     keep in the station records, and I think there is a clear  
5     inconsistency here, and this is clearly relevant to the  
6     representations he makes in his April 7, 1994 letter. How  
7     can you keep a maintenance log without knowing when you  
8     originally put the -- originally installed the transmitter  
9     in the first place? It's a non sequitur.

10                JUDGE CHACHKIN: Well, I'll legality you go  
11     further with your examination. I'll overrule the objection  
12     if you can establish that somehow this maintenance data  
13     would also include the information that the Commission  
14     requested in the letter.

15                BY MR. SCHAUBLE:

16                Q     The pending question, Mr. Kay, was did you ever  
17     keep the records required by 90.443(b) of the Commission's  
18     rules?

19                MR. SHAINIS: I'll object to that question on  
20     relevancy grounds, Your Honor. It has absolutely no  
21     relevancy to any of the issues at all in this proceeding.  
22     Mr. Schauble has not even come close to establish any nexus  
23     between the letter that the Commission wrote and the  
24     response that the attorney prepared to this rule.

25                MR. SCHAUBLE: Well, what I will do, I will allow

1 this as a preliminary question to see what copied. If this  
2 isn't developed in response to the letter of the Commission  
3 -- response to the Commission, then I will strike all the  
4 material relating to maintenance, but I'll let you continue.  
5 You have to establish a connection between maintenance  
6 records and the information the Commission requested and his  
7 failure to provide that information.

8 MR. SCHAUBLE: Your Honor, I would also point out  
9 that --

10 JUDGE CHACHKIN: I said I'll permit you to go on  
11 with this line of questioning if you can develop a  
12 connection.

13 MR. SCHAUBLE: Okay.

14 JUDGE CHACHKIN: If you can't, then I'll strike  
15 all the questions and answers relating to maintenance logs.

16 MR. SCHAUBLE: Thank you, Your Honor.

17 BY MR. SCHAUBLE:

18 Q Mr. Kay, do you need the question repeated?

19 A Yes.

20 Q Okay. Have you, in fact, ever kept the  
21 maintenance records described in Section 90.443(b) of the  
22 Commission's rules?

23 A Where are those? I'm reading through here.

24 Q It's the second paragraph B. It's at the top of  
25 the page.

1           A     Okay.

2           Q     It reads:  For all stations the dates and  
3     pertinent details of any maintenance performed on station  
4     equipment and the name and address of the service technician  
5     who did the work."

6           A     What are "pertinent details"?  What I have are the  
7     billings from my technician, who says on a certain date he  
8     went to a certain hill, and the guy did the work.  I know  
9     who my service technicians are.  There is only like two guys  
10    that we use on a regular basis to do any work.  If we have a  
11    problem with the station, we called them up and say, hey,  
12    what's happening?  They maintain my stations.  You have all  
13    of these bills.

14          Q     But it's correct that those bills do not -- would  
15    not allow you state anything other than that the technician  
16    performed work at a certain mountain site on a certain date.  
17    Correct?

18          A     That's what -- I have to take a look at the bills.  
19    I don't know what all detail they put in there.  If we have  
20    something broken, we send a technician up to fix it.  I  
21    don't know what pertinent details you're wanting them to  
22    report.  We have the date, and we know the technician and  
23    the station -- a number of our stations their physical  
24    hardware that has multiple call signs on it.  I don't know  
25    what exact records -- I don't have a form that we are

1       supposed to use. If we were supposed to keep some type of a  
2       form, I don't know what it was. I still don't.

3           Q     Do you recall in connection with this proceeding  
4       that your stations were inspected?

5           A     Oh, yeah. I do remember.

6           Q     And is it correct that Mr. Paul Oei was one of the  
7       individuals involved in inspecting your stations?

8           A     Yes.

9           Q     And do you recall that Mr. Oei requested copies of  
10      your station records?

11          A     We told him what we had -- service invoices. He  
12      didn't want to see it. You guys have the service invoices  
13      at that time. I don't know what more you wanted me to show  
14      him.

15          Q     Now, at this time did you keep any records of  
16      dates stations were constructed?

17          A     What I had were like the 800(a) response letters,  
18      which I supplied to you guys.

19          Q     Let's back up. Could you explain for the record  
20      what an "800(a) letter" is?

21          A     When the Commission grants an 800-megahertz  
22      license initially that includes a base station facility.  
23      Sometime after eight months after the grant of that license,  
24      at the Commission's convenience, their staff kicks out a  
25      letter, which they call an 800(a) which basically says, Dear

1 Licensee, on this date you are assigned call sign whatever.  
2 Please tell us when and where you have constructed the  
3 station, which the licensee responds to. I received a  
4 number of those and responded accordingly. And I provided  
5 you copies of those that I had.

6 Q Okay. Just so the record is clear, you provided  
7 copies of those letters in connection with discovery in this  
8 proceeding, not prior to designation hearing. Correct?

9 A I believe that's correct.

10 MR. KELLER: Oh, well, just to make the record  
11 clear, copies of others that were submitted to the  
12 Commission prior to the designation.

13 MR. SCHAUBLE: You already had them.

14 MR. KELLER: These were letters that were mailed  
15 back to the Commission.

16 JUDGE CHACHKIN: Let's take a 10-minute recess.

17 JUDGE CHACHKIN: Mr. Schauble, where are we going  
18 with this? The letter requested that information be  
19 provided, the date, the license, the station was constructed  
20 and placed in operation. Mr. Kay responded that the rules  
21 do not require Mr. Kay to keep any record of that  
22 information.

23 Now, apparently the maintenance records -- there  
24 was nothing specifically in the rules dealing -- requiring  
25 the maintenance records to contain information as to the

1 date of construction. In fact, it's just general  
2 information, the dates and pertinent details of any  
3 maintenance performed on the station equivalent. Now, is  
4 there any other Commission rule you would like to refer to  
5 which required a licensee to keep the dates of construction?

6 MR. SCHAUBLE: Your Honor, we think -- the  
7 Bureau's reading of the rule is that any time there is  
8 significant work done with respect to a station under this  
9 rule, there has to be a record kept of it, and --

10 JUDGE CHACHKIN: But you asked for the dates of  
11 construction. The letter asked for the dates of  
12 construction. Is there anything in the rule that requires  
13 that the maintenance records contain the date of  
14 construction?

15 MR. SCHAUBLE: Your Honor, it's our position the  
16 maintenance records include the most fundamental piece of  
17 maintenance you can perform on a piece of equipment is  
18 installing it in the first place.

19 MR. SHAINIS: That's not maintenance.

20 JUDGE CHACHKIN: That's not maintenance. That's  
21 construction.

22 MR. SHAINIS: And installation.

23 JUDGE CHACHKIN: Yes the rules -- all I can go by  
24 is what the rules you showed me. There is nothing here  
25 which says a licensee shall maintain the date of

1 construction. It says the date of maintenance.  
2 "Maintenance" means after construction to maintain the  
3 equipment. It's not the initial construction.

4 MR. KELLETT: I believe Your Honor can look at it  
5 in the context of the Department rules, and I have the 1992  
6 rule book for you. The station records are a copy of the  
7 license any time work is performed on the station. The  
8 technician signs the records. You are not allowed to  
9 obliterate the entry. You have to cross it out. You have  
10 to initial it to change the records.

11 You have to have the data all available when the  
12 Commission comes to inspect your stations. And this rule,  
13 443, is broad enough to cover construction, that any time  
14 pertinent work is done on the station, now Mr. Shainis  
15 obviously disagrees --

16 JUDGE CHACHKIN: So does Mr. Keller.

17 MR. SCHAUBLE: Mr. Shainis said -- well, you were  
18 more vocal than Mr. Keller. But Your Honor may not agree  
19 with that position --

20 JUDGE CHACHKIN: Well, I'm just looking at what  
21 the rule says. The rule doesn't tell you how you're  
22 supposed to keep this information. You can keep this  
23 information on a piece of paper according to this rule. It  
24 doesn't say a specific form.

25 MR. SCHAUBLE: The following rule, if you take a

1 look at it --

2 JUDGE CHACHKIN: What does the following rule say?

3 MR. SCHAUBLE: "Form of station records. Station  
4 records shall be kept in an orderly manner in such detail  
5 that the data required are readily available. Key letters  
6 or abbreviations may be used if the proper meaning or  
7 explanation is set forth. Each entry in the record" -- this  
8 is paragraph B -- "each entry in the records at each station  
9 shall be signed by a person qualified to do so, having  
10 actual knowledge of the records to be reported."

11 JUDGE CHACHKIN: That's fine, but we are still not  
12 talking about how we kept records. We are talking about was  
13 there any requirement in the Commissions reels requiring you  
14 to keep the -- of construction?

15 MR. SCHAUBLE: We believe that that is covered by  
16 the maintenance rule, Your Honor.

17 JUDGE CHACHKIN: Well, the maintenance rules don't  
18 state, so I don't see how you can --

19 MR. SHAINIS: I would ask -- to provide the basis  
20 for their belief that it's covered under the rule that they  
21 are providing us.

22 MR. KELLETT: Well, I'll go a step further, Your  
23 Honor. Even if they did provide a basis, that's an  
24 interpretation of the rule, which they are certainly free to  
25 argue in their conclusions of law, but I don't think they



1     should be arguing with the witness about it unless there is  
2     a specific rule.  If they want to argue in their conclusions  
3     that this is what the rule means, they can argue, and then  
4     you can make a ruling, but they shouldn't be arguing with  
5     the witness about it.

6                 JUDGE CHACHKIN:  All right.  Do you want to put in  
7     evidence the maintenance rules and argue later on that  
8     somehow this Commission cases which interpret or policy  
9     declarations which interpret this language so that a person,  
10    a licensee would be on notice as to what records they keep,  
11    fine?  But I don't see anything in this particular document  
12    which you supplied which requires that information.  I mean,  
13    if the Commission wants that information, it should state  
14    so.  A licensee is not required to guess.  All it says is  
15    "maintenance records."  Let's go ahead.

16                MR. SCHAUBLE:  Very well, Your Honor.

17                BY MR. SCHAUBLE:

18                Q     Mr. Kay, you understood from the Commission's  
19     January 31, 1994 letter that questions had been raised as to  
20     when you constructed -- whether you had constructed certain  
21     facilities in a timely manner.  Correct?

22                A     It says the Commission received complaints.

23                JUDGE CHACHKIN:  What are you referring to now?  
24     What paragraph?

25                MR. SCHAUBLE:  Again, Your Honor, we are referring

1 to the information requested in paragraph two of the January  
2 31, 1994 letter.

3 JUDGE CHACHKIN: All right. You're talking about  
4 WTB Exhibit 1.

5 MR. SCHAUBLE: Correct.

6 JUDGE CHACHKIN: Is that what you're talking  
7 about?

8 MR. SCHAUBLE: Correct. Yes. That's correct,  
9 Your Honor.

10 JUDGE CHACHKIN: All right.

11 BY MR. SCHAUBLE:

12 Q And, Mr. Kay, you also understood that the  
13 Commission was asking for the date you had constructed  
14 stations. Correct?

15 A I think the letter speaks for itself. That's what  
16 it says.

17 Q Okay. And would you agree that the question of  
18 when you constructed stations would be relevant to  
19 determining whether you had constructed those stations in a  
20 timely manner?

21 MR. SHAINIS: Objection to the form of the  
22 question. Asking this witness as to what is relevant and  
23 what is not relevant is beyond the scope of this witness to  
24 testify.

25 JUDGE CHACHKIN: I'll sustain the objection to

1     that question. The question is whether there are  
2     requirements of the Commission to keep this information.  
3     Whether it's relevant or not relevant is not important. If  
4     you can point out in each of these cases whether there was  
5     some rule or policy of the Commission requiring them to keep  
6     this information, fine, point it out. If you're going to  
7     charge him with not having information, then you've got to  
8     show that there was a requirement that he provided that  
9     information.

10               BY MR. SCHAUBLE:

11           Q     Well, let's clarify. Mr. Kay, with respect to the  
12     800-megahertz stations, is it correct that you had this  
13     information in the form of 800(a) letters?

14           A     I had some 800(a) letters.

15           Q     Okay. Now, that most of the stations licensed to  
16     you are either in the 800-megahertz band or the  
17     470-to-512-megahertz band?

18           A     Not all, but primarily.

19           Q     Okay. Now, with respect to 470-to 512-megahertz  
20     stations, did you keep any records concerning when stations  
21     were constructed?

22           A     I don't recall specific records, but a number of  
23     them I could determine --

24           Q     Okay.

25           A     -- because it was coincident with grant.

1 Q Could you explain that further, please?

2 A I mean, it was already there when it was granted  
3 because it was already a previously licensed facility, as in  
4 a private-carrier conversion converting an existing  
5 customer-licensed station to a private carrier. Therefore,  
6 when my license as a private carrier was granted and my  
7 customers' licenses were canceled, my station would have  
8 been already constructed because there was already an  
9 existing license to operate a piece of hardware.

10 Q And would it also be direct, Mr. Kay, that you  
11 would have instances where you would take a station licensed  
12 through assignment or transfer?

13 A Whether it was by conversion or by assignment,  
14 there were a number of cases I identified in discovery and  
15 gave to the Bureau where I was able to say this station  
16 already existed upon grant date; and, therefore, the grantee  
17 was technically the construct date for that call site.

18 Q Okay.

19 A That's where hardware and operating a piece of  
20 equipment on a given frequency does not necessarily  
21 correspondence to a call sign. I don't know if this makes  
22 sense to you.

23 Q No. It's also true that there were times when you  
24 would have -- you would apply for new licenses in the  
25 475-to-12-megahertz band, which would authorize a new

1 operator or a different frequency. Correct? A new station.

2 A Yes, but it was actually more a rarity than  
3 common.

4 Q Okay. Now, with respect to those particular class  
5 of stations, those types of stations, could you have any  
6 records as to when those stations were constructed?

7 A I don't recall keeping specific records, per se,  
8 though I was able to identify some dates from, for example,  
9 service technician billings and other methods, and I gave  
10 that all to you guys.

11 Q Okay. And, again, you provided that in discovery,  
12 post-designation on this proceeding. Right?

13 A We did an extensive amount of research to answer  
14 your discovery, yes.

15 Q Mr. Kay, I'd like to turn your attention to  
16 paragraph number five of WTB Exhibit 1.

17 A Yes.

18 Q Okay. Now, which asked the user list and certain  
19 information on top of that. Do you have that before you,  
20 Mr. Kay?

21 A Yes.

22 Q Okay. Now, is it correct that in 1994 you had  
23 such information in your records with respect to your  
24 customers' current configuration?

25 MR. SHAINIS: Objection. I have no idea what he

1 is talking about by saying "current configuration."

2 JUDGE CHACHKIN: Sustained.

3 MR. SCHAUBLE: Okay.

4 BY MR. SCHAUBLE:

5 Q Mr. Kay, the information described in paragraph  
6 five, WTB Exhibit 1, did you have this information in your  
7 records?

8 A It starts with "for each station shall," which  
9 would be call signs. I did not keep records by call sign.

10 Q Okay.

11 A I never did. I still don't.

12 Q Okay. You had in your records a list of who your  
13 users were. Correct?

14 A List. I have a computer system which contains our  
15 customers' names and other information on our customers. I  
16 have paper files which generally gets one to a customer.

17 Q Okay. And it's correct --

18 A I guess you could call the computer a list, but I  
19 don't have a, per se, list that I can think of. I have a  
20 computerized data base.

21 Q Okay. And that data base contained information on  
22 what mountain tops customers operated from. When and what  
23 date, what time?

24 JUDGE CHACHKIN: We are going back to 1994. Is  
25 that right?

1 MR. SCHAUBLE: 1994.

2 JUDGE CHACHKIN: The date of the Commission letter  
3 January 1, 1994.

4 THE WITNESS: I had a computer that contained my  
5 customers' names, addresses, telephone numbers, contact  
6 names, and billing rates, balances owed, balances paid, last  
7 dates receivable. It was primarily a billing system. It  
8 did include information on the customers on most of the  
9 information of their systems, but it was not necessarily  
10 complete in that regard.

11 JUDGE CHACHKIN: Go ahead.

12 BY MR. SCHAUBLE:

13 Q Is it correct that -- let me ask it this way. In  
14 January of 1994, did you have a way of determining how many  
15 mobile units a certain customer had?

16 A We had entered for our convenience a number of  
17 control stations and mobiles that we believed the customer  
18 had. This is not connected to the billing.

19 Q Okay. And in 1994, did you have a record of what  
20 locations or mountain tops customers received service from?

21 A We generally placed the primary information about  
22 the customer has to which mountain top he was on  
23 communications frequency and/or system that he was on. It  
24 would include the repeaters for certain. It would contain  
25 at least one repeater. It would depend on the age of the

1 record. There were some old records that were not complete.  
2 The newer ones were, all of the information.

3 The program we had was -- improved, but we did not  
4 go back and check every customer record to make sure it was  
5 fully updated. So it contained at least the primary  
6 information about the customer. More detail than that would  
7 have generally had to be looked up from customer records,  
8 but it contained the repeater, which would contain the  
9 location the frequency and/or system information.

10 Q Mr. Kay, turn back to WTB Exhibit 3.

11 A Okay.

12 Q And page four, paragraph number five.

13 A Yes.

14 Q Now, is it correct that under your system in order  
15 for a radio to access a particular frequency, that frequency  
16 has to be programmed into the radio?

17 A Try again with your question. I'm not sure what  
18 you meant.

19 Q Sure. In order for a radio to access a particular  
20 frequency, is it correct that that frequency has to be  
21 programmed into the radio?

22 A To operate?

23 Q To operate?

24 A Yeah. Well, it has to be programmed in order to  
25 operate on a frequency --



1 Q Okay.

2 A -- or crystallized it depends on the type of radio  
3 -- programs are crystallized.

4 Q Okay. Well, at least some radios, is it possible  
5 to program frequency into a radio without the radios  
6 actually being able to access all of these frequency?

7 A What type of radio are we talking about here?

8 Q Let's talk about 800-megahertz radio.

9 A Okay.

10 Q Could it be possible to do that with at least  
11 certain types of radios?

12 A Try your question again. Let me think about it a  
13 bit what you're trying to ask me.

14 Q Okay. Now, is it possible to program frequencies  
15 into a mobile unit without the mobile unit exactly being  
16 able to access all of these frequency?

17 A You keep using the word "access." Are you meaning  
18 operate, to transmit or to receive or both?

19 Q To operate.

20 A You can do a lot of things with programming. I  
21 suppose you can probably do that.

22 Q Okay.

23 A It may not make sense to do it, but I suppose it  
24 could be done.

25 Q Okay. Let me ask you --

1           A     You're asking me a theoretical question. I can  
2     only give you a theoretical answer.

3           Q     Okay. Let me ask you this question. The customer  
4     comes to you and both purchases radios from you and request  
5     repeater service, is this correct that the mobile unit has  
6     to be programmed to the proper frequency? Correct?

7           A     Programmed or crystallized.

8           Q     Okay. Now, what was the process that was used to  
9     -- strike that. Let me ask it this way. Who would be  
10    responsible for conducting that program?

11          A     Who would physical do the work?

12          Q     Yes.

13          A     Technicians, but some of the salespeople also  
14    could have the capability.

15          Q     Okay. Were they given directions or instructions  
16    as to how to program a particular customer's radios?

17          A     Generally. They had to know what they were doing.

18          Q     Okay.

19          Q     Have you heard of the term "programming maps," Mr.  
20    Kay?

21          A     Yes.

22          Q     Would you state for the record what a programming  
23    map is?

24          A     It's used in relation to trunk systems generally,  
25    and it is a list that's used primarily with the -- we use it

1 in connection with the LTR style of trunking.

2 Q Okay.

3 A And it lists the frequencies that are assigned to  
4 the 20 possible frequency used as part of a trunk system.

5 Q Okay. So --

6 A Does that answer your question?

7 Q Yes. So would it be correct that if the service  
8 technician or salesman would use the programming map in  
9 order to determine what frequency to program into a  
10 particular radio?

11 MR. SHAINIS: I'll object. There has been no --  
12 Mr. Kay was asked the definition of a programming map.  
13 Counsel is assuming that a programming map is used by Mr.  
14 Kay in his business. That has not been established.

15 MR. SCHAUBLE: The witness just testified that he  
16 used it.

17 JUDGE CHACHKIN: Overruled. Go ahead with your  
18 question.

19 BY MR. SCHAUBLE:

20 Q Would it be correct, Mr. Kay, that the service  
21 technician or salesperson would use a programming map to  
22 determine what frequency to program into the radio?

23 A You're kind of mixing apples and oranges here  
24 again. The programming maps are generic. They are not  
25 individualized to each customer, if this makes sense to you.

1 MR. SCHAUBLE: Okay.

2 JUDGE CHACHKIN: What do you mean by --

3 THE WITNESS: Okay. You have a -- example: We  
4 have a trunk system on Mount Lukens. A trunk LTR system can  
5 have up to up to 20 channels in it. We have a programming  
6 map that's entitled "Mount Lukens," and it lists the 20  
7 frequency slots that are associated with that site. Anybody  
8 who has a Mount Lukens system has that map, but that map is  
9 used for all customers who use Mount Lukens, and it's not  
10 individualized to a customer.

11 BY MR. SCHAUBLE:

12 Q Now, if the 1994, for your customers for these  
13 programming maps, if those 20 frequencies were programmed  
14 into the radio, would that necessarily mean that the  
15 customer would be able to transmit or receive on any of  
16 those -- all of these 20 frequencies?

17 A The map only sets part of the system. It sets the  
18 underlying system that the radio will operate on. The  
19 individual frequencies that the radio may operate on on the  
20 map is determined by further programming that is customized  
21 to the customer. So that further programming would  
22 determine which of the maps channels matched up against the  
23 configuration of the repeater system would be operational  
24 for the customer, and can also -- we technicians have  
25 control of how that works.

1           It's the underlying infrastructure of the system  
2   itself, much like a cellular phone can communicate with a  
3   given cell site, but the number of channels at that cell  
4   site and the number of channels that are used at that cell  
5   site and what their frequencies are is transparent to a  
6   customer, but the cellular telephone company can certainly  
7   change and swap and take them in and out of service, add or  
8   delete or whatever those frequency as they see fit for their  
9   business needs. We can do similar with our trunk systems.

10          Q     Okay.

11          A     If that helps.

12          Q     Now, would this further programming, would that  
13   take place within the mobile unit or the repeater or both?

14          A     The programming, again, you're kind of using loose  
15   terms here. The radio requires further programming to  
16   customize it to the customers' needs. We have to do  
17   corresponding. You could use the word programming, but we  
18   think of it as validation to allow the customers to use the  
19   trunk system. Just programming the radio doesn't mean you  
20   can use their trunk system. We have to turn on the service.  
21   That, you could call programming.

22          Q     Okay. Now, in 1994, were there times when, for  
23   one reason or another, it was necessary or desirable to  
24   change the frequencies the frequencies that a customer  
25   operated under?

1           A     I'm sure there were.  You're asking me  
2     generically, I'm sure there were.

3           Q     Okay.  Now, for a customer who had a programmable  
4     radio with frequencies programmed in, if it was necessary to  
5     change that customer's frequencies, could you please  
6     describe the process that would be involved in changing  
7     those frequencies?

8           THE WITNESS:  For a programmable radio?

9           MR. SCHAUBLE:  For a programmable radio.

10          MR. SHAINIS:  Objection on relevancy.

11          MR. SCHAUBLE:  Your Honor --

12          JUDGE CHACHKIN:  Where are we going with this?

13          MR. SCHAUBLE:  Your Honor, in paragraph five of  
14     this letter there is a suggestion here that, as I read it  
15     anyway, that perhaps the Commission should limit its request  
16     for inquiry to those specific stations which it's received  
17     complaints about.  And what I'm trying to do is establish a  
18     -- here that that's not necessarily sufficient in these  
19     circumstances because the capability exists to move  
20     customers from station to station, and in order to  
21     satisfactory anybody's loading, you need an a complete  
22     picture of the overall loading in order to determine whether  
23     somebody is properly loaded throughout their system.

24          MR. SHAINIS:  Your Honor, I don't know how these  
25     questions that Mr. Shainis is asking get to that.  The

1 letter itself is not what is the subject of the hearing, per  
2 se. The loading is, and questioning the basis of the letter  
3 doesn't get us to the answer that Mr. Shainis is seeking.

4 MR. SCHAUBLE: Your Honor, I think this is  
5 relevant to the 308(b) issues --

6 JUDGE CHACHKIN: I'll overrule the objection. Go  
7 ahead.

8 BY MR. SCHAUBLE:

9 Q The question, Mr. Kay, was, what would be the  
10 process involved in changing the frequency for a customer  
11 who had a programmable radio?

12 A If we wanted to move Customer X, we would  
13 determine what radios he had, make a model, because that  
14 varies how we are going to program it. We would write out a  
15 new -- we would assign whatever new frequencies or codes  
16 that we chose to, and a salesperson and/or a technician  
17 would either visit the customer and do the programming with  
18 a computer or the customer would bring their radios to our  
19 shop or a salesperson or a technician would change the  
20 programming. That's the simple short of it.

21 Q Now, in 1994 on your system, would there be  
22 customers who would be programmed in such a manner that if  
23 you wished to -- if the radios were programmed in such a  
24 manner so that if you wished to change frequencies, that  
25 would not be necessary to actually access the customer's

1 radio, that the change could be made simply by changes to  
2 the programming at the repeater?

3 A Do you mean -- I want to try to clarify what  
4 you're trying to ask me here. Can we change the operating  
5 frequency of a radio without physically touching it with a  
6 computer or doing something to it, in effect by remote from  
7 a repeater?

8 Q Correct.

9 A No. Not that I can think of.

10 Q Okay.

11 A There is a brand-new technology that does that,  
12 but we don't have it.

13 Q Okay. In 1994, did you have radios programmed  
14 with additional frequencies, mobile units, programmed with  
15 additional frequencies other than those the customer was  
16 transmitting or receiving on at that time?

17 MR. SHAINIS: Objection as to relevancy.

18 JUDGE CHACHKIN: How is it relevant?

19 MR. SCHAUBLE: Your Honor, I'm trying to get into  
20 the process of the ease or difficulty of switching a  
21 customer from to another, which I think is relevant to the  
22 argument made here, the suggestion made in paragraph five of  
23 the letter that the Commission should limit its inquiry to  
24 certain call signs.

25 JUDGE CHACHKIN: This all deals with loading. Is



1     that what you're talking to?

2             MR. SCHAUBLE:  It's relevant to loading.  I think  
3     it's also relevant to the 308(b) issue also.

4             JUDGE CHACKIN:  All right.  I'll overrule the  
5     objection.

6             THE WITNESS:  Our customers would be programmed  
7     with frequencies -- let's clarify.  If they are on our trunk  
8     systems, they are going to get the maps because that's  
9     necessary to operate on the trunk system, period.  So if  
10    you're talking about the custom programming for each  
11    customer as compared to the programming maps, we would  
12    program in the necessary number of systems that would serve  
13    the customer's needs as they and our salespeople decided.

14            If the radio had it programmed in it, presumably  
15    the customer could and/or would be using it to some degree  
16    to meet their communications needs.  If you're asking did we  
17    put a system in that is far flung and well removed from the  
18    customer's service area would be, no, we put stuff in that  
19    the customer asks for or needed and would use.

20            If you're trying to suggest that we put some fluff  
21    in the customers' radios programming-wise, there is no  
22    reason to do that.  The customers would be confused by it,  
23    and it would eat up resources that we could sell to other  
24    customers if that's what you are trying to ask me.

25            BY MR. SCHAUBLE:

1           Q     Mr. Kay, turning to, again, page four, the  
2 paragraph that starts at the very bottom of the page --

3           JUDGE CHACHKIN: Is this still Exhibit 3 you're  
4 talking about, WTB 3?

5           MR. SCHAUBLE: Yes, Your Honor.

6           JUDGE CHACHKIN: All right.

7           BY MR. SCHAUBLE:

8           Q     And specifically the sentence, "with respect to  
9 the specific information requested, we respectfully note  
10 that the stations licensed to Mr. Kay are not shared." Do  
11 you see that, Mr. Kay?

12          A     Let me read the context it's in. I see the  
13 sentence, but I'd have to read the context it's in to see  
14 what he is trying to talk about here. I see it.

15          Q     Okay. Now, isn't it true that, Mr. Kay, that at  
16 least with respect to certain stations, you did share those  
17 frequencies with other licensees?

18          MR. SHAINIS: Objection, Your Honor. I think  
19 that's a misinterpretation of what this language is  
20 referring to, and I don't mean to suggest it, but I think  
21 counsel was referring to whether or not a channel is shared  
22 versus exclusive, which I don't believe is the context in  
23 which the author of this sentence was using the term  
24 "shared." First, am I correct, are you talking about the  
25 distinction between a shared versus an exclusive channel?

1 MR. SCHAUBLE: Yes.

2 MR. SHAINIS: And, Your Honor, I would submit that  
3 what is being referred to here with the citation is that  
4 there are certain Commission rules which have to do with  
5 when there is shared use of a given station by more than one  
6 user as opposed to shared use of a frequency, because I'm  
7 sure you understand in this service there may be several  
8 different licensees with different stations in the same area  
9 on the same frequency. That's what Mr. Schauble is  
10 referring to, but that's not what this is referring to.

11 This is referring to a certain provision, I  
12 believe, 95.179 of the Commission's rules, which says, if I  
13 want to put a facility, licensed to me but share that  
14 specific station with Mr. Shainis, then I'm required to  
15 maintain certain records. I'm allowed to do that. Mr.  
16 Shainis doesn't have to get his own license, but I need to  
17 maintain certain records about who Mr. Shainis is. That's  
18 what this statement is referring to. So we are mixing  
19 apples and oranges, and I object to the question on that  
20 basis.

21 JUDGE CHACHKIN: Sustained.

22 BY MR. SCHAUBLE:

23 Q Just for the record, Mr. Kay, is it correct that  
24 you have certain frequencies which certain stations that you  
25 operate in which the frequencies are shared with other

1 licensees? Correct?

2 A Yes.

3 Q Turning to the next sequence, Mr. Kay, "Therefore,  
4 the Commission does not require Mr. Kay to maintain any  
5 records of his users' names, business address, phone number,  
6 contact person, number of mobile units, or number of control  
7 stations, or to take any action when the loading on the  
8 stations changes," do you see that?

9 A Yes.

10 Q Now, in fact, you did keep information concerning  
11 the user's name, business address, phone number, and contact  
12 person. Correct?

13 A Of course.

14 Q And you kept information concerning the number of  
15 mobile units or number of control stations they had.  
16 Correct?

17 A We kept some information on it, yes.

18 Q Okay. Mr. Kay, please turn your attention to WTB  
19 Exhibit 4.

20 Q And was this a letter you received on or shortly  
21 after May 11, 1994?

22 A Yes.

23 Q Okay. And did you read this letter on or shortly  
24 after the time that you received it?

25 A I presume so.

1           Q     Mr. Kay, please direct your attention to WTB  
2     Exhibit Number 5. Was this a letter written on your behalf  
3     by Brown & Schwaninger?

4           A     Yes.

5           Q     Okay. Did you receive this letter on or shortly  
6     after May 17, 1994?

7           A     Yes.

8           Q     Did you review this letter or a prior version of  
9     this letter prior to May 17, 1994?

10          A     I don't recall.

11          Q     Mr. Kay, please direct your attention to the last  
12     paragraph on page one of the letter.

13          A     Which paragraph?

14          Q     That's it. It starts: "We respectfully note that  
15     we have filed the number of copies." It's the last  
16     paragraph on page one going over to page two.

17          A     Okay. I've got it.

18          Q     Did you ever make any attempt to ask the  
19     Commission why they were requesting 50 copies of your  
20     response?

21          A     I don't personally recall having done so.

22          Q     Okay. Do you recall whether you ever asked your  
23     attorney to ask the Commission why they were requesting 50  
24     copies of your response?

25                 MR. SHAINIS: Excuse me, could you repeat the

1 question again?

2 MR. SCHAUBLE: Sure.

3 BY MR. SCHAUBLE:

4 Q Did you ever ask your attorney to ask the  
5 Commission why they were requesting 50 copies of the  
6 response?

7 MR. SHAINIS: I'll object.

8 JUDGE CHACHKIN: "Why," not "whether." Why they  
9 were requesting 50 copies.

10 MR. SCHAUBLE: Why.

11 MR. SHAINIS: I'll object, and I'd like to confer  
12 with Mr. Kay to see whether he wants to before he answers  
13 that invoke the attorney/client privilege.

14 MR. SCHAUBLE: Your Honor, this is relating to --  
15 I don't think this would be a matter of that would fall  
16 within the privilege, particularly since we are talking  
17 about a possible communication with an outside party here.

18 MR. SHAINIS: No. It's a communication that Mr.  
19 Kay had with his attorney. That's what will be privileged.

20 JUDGE CHACHKIN: The question is what?

21 MR. SCHAUBLE: Your Honor, let me rephrase the  
22 question.

23 JUDGE CHACHKIN: All right.

24 BY MR. SCHAUBLE:

25 Q To your knowledge, Mr. Kay, did your attorney ever

1 ask the Commission why the Commission was requesting 50  
2 copies of Mr. Kay's response?

3 A I don't know.

4 Q So would it be correct that this letter states,  
5 "Since the Commission would not possibly require 50 copies  
6 for its own internal use, the only reasonable conclusion is  
7 that the Commission intends to make further circulation of  
8 Mr. Kay's response beyond the Commission"? That sentence  
9 was not -- to your knowledge, that sentence was not based  
10 upon any discussions or communications with Commission  
11 personnel?

12 A Try that question on me again.

13 Q Sure. Let me rephrase the question, Mr. Kay.  
14 That sentence there; would it be correct to state that that  
15 question was merely a supposition of you and your attorney?

16 MR. SHAINIS: Objection. It's asking this witness  
17 -- first of all, the letter is written by the attorney, not  
18 by the witness. Number two, Mr. Schauble is asking the  
19 witness to speculate as to what the author of the letter  
20 intended.

21 JUDGE CHACHKIN: Where are we going with this?

22 MR. SCHAUBLE: Your Honor, the record will show  
23 that one of the proffered reasons for not -- for Mr. Kay not  
24 providing the information was concerns about  
25 confidentiality, and the record will show there that he

1 cites the fact that at one point the Commission requested 50  
2 additional copies of material was justification for not  
3 providing that material. I think we are entitled to test  
4 the statement to determine what the basis of that statement  
5 was.

6 JUDGE CHACHKIN: What do you want to test, that  
7 the Commission requested 50 copies? The Commission didn't.  
8 Isn't that what you said, that the Commission requested 50  
9 copies?

10 MR. SCHAUBLE: At one point in time, that's  
11 correct, Your Honor.

12 JUDGE CHACHKIN: Why did the Commission want 50  
13 copies? I've never heard of it. It's not what you have to  
14 file with the Commission. Where did the 50 copies come  
15 from?

16 MR. KELLETT: You know, I'm not the one who  
17 requested it, Your Honor, but Mr. Kay copyrighted its  
18 response to the earlier request, in other words, trying to  
19 make sure that we would not make copies of them, and the  
20 procedures manual designate something for hearing at that  
21 time required something like 35 copies, so we just requested  
22 50 copies, and we are going to -- copy issue.

23 MR. SHAINIS: The manual of what?

24 MR. KELLETT: There is some circulation manual  
25 that OGC got this many, each other Bureau got this many for



1 their advisers, each commissioner's office got this many.  
2 And so if we were to ever designate it for hearing, we  
3 needed this many copies. So we figured we never needed more  
4 than that.

5 JUDGE CHACHKIN: You're saying because Kay here  
6 requested copy right protection; therefore, you couldn't  
7 duplicate it?

8 MR. SHAINIS: The copyright protection was  
9 requested very early on, and this was the first time that 50  
10 copies were requested. I mean, there was copyright with  
11 other letters that Kay's attorneys had written.

12 JUDGE CHACHKIN: Are you saying that you were  
13 preparing already at this time?

14 MR. KELLETT: At this point, they were -- case  
15 law.

16 JUDGE CHACHKIN: I don't know where we are going  
17 with this 50 copies. The rules didn't require him to  
18 provide 50 copies, did it?

19 MR. SHAINIS: I object to it, Your Honor, that's  
20 for sure, but if it's a way to get around the copyright  
21 problem -- designated for --

22 JUDGE CHACHKIN: So where do we go from here? He  
23 didn't give you 50 copies.

24 MR. SCHAUBLE: He draws the supposition here that  
25 we are requesting 50 copies; therefore, that must mean that

1 they are going to circulate his response outside the  
2 Commission.

3 JUDGE CHACHKIN: All right, was the response what  
4 the Commission is saying, that was not the purpose?

5 MR. SCHAUBLE: Yes.

6 JUDGE CHACHKIN: Okay. We'll get to that, then.  
7 Let's get to it.

8 BY MR. SCHAUBLE:

9 Q Mr. Kay, please direct your attention to WTB  
10 Exhibit Number 6. Mr. Kay, do you recognize this as a  
11 letter addressed to your counsel?

12 A It is addressed to my counsel.

13 Q Okay. Do you recall receiving this letter on or  
14 shortly after May 20, 1994?

15 A I believe it was forwarded to me by my counsel  
16 since it wasn't mailed to me.

17 MR. SCHAUBLE: Okay.

18 JUDGE CHACHKIN: Did you object to anything in  
19 this letter that your counsel submitted information?

20 THE WITNESS: I'm sorry?

21 JUDGE CHACHKIN: Did you notify your counsel that  
22 you objected to any of this response to the Commission?

23 MR. SCHAUBLE: Your Honor, I believe WTB Exhibit 6  
24 is a letter to the Commission -- from the Commission to --

25 JUDGE CHACHKIN: Six is?

1 MR. SCHAUBLE: -- yeah, to counsel.

2 JUDGE CHACHKIN: All right. This is a letter  
3 that's sent to his counsel. All right. All right go ahead.  
4 Where is the other 50 letters? Where is it saying about the  
5 50 copies?

6 MR. SCHAUBLE: That was on a prior exhibit, Your  
7 Honor.

8 JUDGE CHACHKIN: No, but where is there anything  
9 in this letter saying the reason why the Commission needed  
10 50 copies?

11 MR. SCHAUBLE: There is nothing in this  
12 particular; however, this letter does deal with the issue of  
13 confidentiality.

14 JUDGE CHACHKIN: All right.

15 MR. SHAINIS: Your Honor, I don't believe the  
16 Commission ever addressed why they needed 50 copies of  
17 official correspondence. I believe they just ignored it.

18 MR. SCHAUBLE: Well, Your Honor, at one point the  
19 record will show they dropped that when they requested an  
20 additional one copy.

21 JUDGE CHACHKIN: Well, you brought up the 50  
22 copies as somehow --

23 MR. SCHAUBLE: I think it's something that Mr. Kay  
24 originally brought up in the correspondence.

25 JUDGE CHACHKIN: Well, he didn't bring up 50

1 copies. The Bureau asked for 50 copies, did they not?

2 MR. SCHAUBLE: At one point in time, yes, Your  
3 Honor.

4 JUDGE CHACHKIN: Right. And you've now brought it  
5 up as something that's the basis for finding Mr. Kay, you  
6 know, against Mr. Kay. That's how we got into this.

7 BY MR. SCHAUBLE:

8 Q Mr. Kay, directing your attention to the third  
9 paragraph on page one --

10 A On Exhibit 6?

11 Q Yes, the third paragraph.

12 A All right.

13 Q -- and material that starts with "With respect to  
14 Kay's request that the information provided to the  
15 Commission in response to our inquiry be withheld from  
16 public inspection." And direct your attention specifically  
17 to that sentence and the following sentence. If you wish,  
18 please read the entire paragraph to see if you've got the  
19 context.

20 A "With respect to Kay's request that information  
21 provided" --

22 Q I'm sorry. To yourself, I didn't mean --

23 A I thought you understood me to read -- fine.

24 Q Okay. Customers that in your industry, records  
25 related to customers would be data that would be customarily

1 be guarded from competitors.

2 A It would be guarded from everyone except between  
3 us and the customer. It's highly confidential.

4 Q And did you understand in this letter that the  
5 Commission was saying that it would not make such materials  
6 routinely available to the public?

7 A I understood they were quoting the FOIA rules.

8 Q Turn to page three of the letter, Mr. Kay. And  
9 the first full paragraph, and specifically, there is a  
10 sentence about two-thirds of the way down the paragraph,  
11 which states: "Kay has advised, however, that the  
12 Commission requested a listing of the totally number of  
13 units operated on each station for all facilities owned or  
14 operated by Kay or by any companies under which he does  
15 business as of January 31, 1994."

16 My question is, after reading that sentence, did  
17 you understand that the Commission was now asking for  
18 loading data as of one specific period of time, that is,  
19 January 31, 1994?

20 A That's what they initially asked. That's not a  
21 change from anything.

22 Q But let me let me ask you this, Mr. Kay. When you  
23 received the Commission's initial response, were you  
24 concerned that they were -- where you ever concerned that  
25 they were asking for data over a period of time as opposed

1 to at one specific point in time?

2 A Are you referring to the initial 308(b) letter?

3 Q I'm referring to the initial 308(b).

4 A Let's take a look and see what it says. I think  
5 from reading January 31, 1994 letter, you can presume that  
6 they wanted a list of ever one of my customers with all of  
7 the information that they requested here as of the date  
8 that, either January 31st or when I actually would have  
9 responded as they demanded.

10 Q Okay.

11 A But some period subsequent some period subsequent  
12 to January 31, 1994, basically the date we did it, was the  
13 specified date. Presumably it was immediately following the  
14 letter would be my presumption if you were asking for my  
15 presumption.

16 Q Okay. Mr. Kay, please turn to page five of WTB  
17 Exhibit 3, and specifically the paragraph numbered six do  
18 you see in that paragraph that your attorneys on your behalf  
19 raised an objection to the request because it did not  
20 specific any date or time as a window of time during which  
21 the information was requested?

22 A Correct. As I said, your letter doesn't, but the  
23 presumption would be that it would be after that sometime,  
24 but it doesn't specifically.

25 Q Okay. But at this time you were reasonably clear